No 286 45.

Brief of Kirlin for Appellee

JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES

Filed April 23, 1897.

October Term, 1896. No. 286

JOSEPHINE W. WUPPERMANN,
Libelant-Appellant

against

THE STEAMSHIP CARIB PRINCE,
JAMES KNOTT
Claimant-Appellee

ON CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CARIB PRINCE

CONVERS & KIRLIN
Proctors for Claimant-Appellee

J. PARKER KIRLIN
Advocate

Supreme Court of the United States,

OCTOBER TERM, 1896. No. 286.

JOSEPHINE W. WUPPERMANN,
Libelant, Appellant,

AGAINST

The Steamship CARIB PRINCE, JAMES KNOTT,
Claimant, Appellee.

BRIEF FOR APPELLEE.

This action was brought into this Court by a writ of *certiorari*, issued October 23, 1895 (p. 215), to review a judgment of the United States Circuit Court of Appeals, for the Second Circuit (WALLACE, LACOMBE and SHIPMAN, *JJ.*), rendered June 5, 1895 (p. 216), which affirmed a final decree of the District Court for the Eastern District of of New York, entered October 11, 1894, dismissing the libel herein, with costs (p. 169).

The libel alleged (p. 2):

"That on or about the 31st of August, 1893, there was shipped upon the steamship Carib Prince, then lying in the Gulf of Paria, and bound for the port of New York, and engaged in business as a common carrier, by Doctor T. G. B. Siegert & Sons, five hundred cases Angostura Bitters, the property of your libelant, to be carried to the port of New York, and there delivered unto your libelant in the like good order as received, for a freight agreed to

be paid therefor, and the agents of said steamship signed bills of lading therefor, dated the 31st of August, 1893, *whereby* they acknowledged the receipt of said 500 cases in good order and well conditioned, and *undertook to deliver* the same at the port of New York in like good order."

This bill of lading was subsequently introduced by the claimant (pp. 145, 146, 147).

The libel further alleged that the cases were not delivered in the like good order as received, to the libelant's damage in the sum of $1,500 (fol. 6). *No charge of unseaworthiness nor of negligence was stated.*

A claim was duly filed by Ernest C. Legge, master of the vessel, in behalf of James Knott, the owner (fol. 2), and on the 13th of March, 1894, Mr. Knott filed an answer to the libel, joining issue on the allegations of the libel, and further claiming the benefit of certain exceptions in the bills of lading:

"SIXTH: For a further defense, the claimant avers that the bills of lading under which the merchandise in question is alleged to have been carried, provided that the merchandise in question was 'to be delivered from the ship's deck, " 'where the ship's responsibility shall cease, in the like good manner and well conditioned, at the aforesaid port of New York; the act of God * * * loss or damage from heat or fire on board, in hulk or craft, or on shore, explosion, steam, *accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances*, jettison, barratry, any act, neglect or default whatsoever, of pilots, masters or crew, in the management or navigation of the ship * * * and all and every other dangers and accidents of the seas, rivers or steam navigation, of whatever nature or kind, always excepted * * * weight, measure, quality, contents and value unknown, and not accountable for inaccurate description of goods shipped, for leakage, breakage or insufficiency in packing, or in strength of package, obliteration of or inaccuracies of marks, numbers, designation or address on the packages, nor for damages or loss from vermin, sweating, decay, heat of holds, contact with or smell or evaporation from other goods; *nor for any consequences arising from any of the foregoing exceptions.*' That the owner and charterer of said vessel used all due diligence to have her properly equipped, manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used

all due diligence in and about the transportation of the merchandise in question, and allege that if the cargo mentioned in the libel was damaged as alleged, the damage was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause. The claimant further alleges that each and all of the above mentioned exemptions in the bill of lading are valid by the law of England which prevails at the port where said merchandise is claimed to have been shipped, and where the said bills of lading are alleged to have been issued."

Three other libels were filed at about the same time for similar damage (pp. 174, 190, 200); all were heard together in the District Court and in the Circuit Court of Appeals (pp. 6, 211), where they are still pending. The aggregate damages claimed in all the libels was $5,179.79.

At the opening of the trial in the District Court, the following admissions were made (fol. 19):

"It is admitted that the cargo was on board, and bills of lading were given. It is admitted that *under the English law, the language of the bill of lading made a valid contract.*"

The damage to libelant's cases of bitters was caused by the escape of sea water from the peak ballast tank into the adjoining or No. 1 hold, owing to the giving way of a three-quarter inch rivet in the peak bulkhead. The accident happened on September 4th or 5th, 1893, on the high seas.

The Carib Prince was an iron and steel steamer of 1,304 tons net register, 300 feet long, and fitted for the carriage of passengers and freight. She was a new vessel, having been in commission only about three months before the accident (fol. 20). Ballast tanks were arranged in the bottom of all the holds, extending nearly to the ship's sides. The perpendicular sides of the ballast tanks and the curved sides of the ship formed a triangular space or canal about eighteen inches in width, into which water

entering the hold would flow. These spaces are called bilges. A pipe line led from the after end of the bilges on each side of the No. 1 hold to the engine-room. Sluice doors on the various bulkheads between the No. 1 hold and the engine-room compartment 'midships connected the bilges in the different holds along the sides of the ballast tanks, forming a kind of channel which also led to the engine-room. For purposes of safety, both the pipe line and the sluice doors were usually kept shut at sea (fols. 288, 330), being opened only to relieve the bilge water, when found there by means of the sounding pipes. A wooden ceiling was laid on top of the ballast tank in the No. 1 hold, and over the top of the bilges, making a continuous floor from side to side of the ship.

The steamer was also fitted with a peak ballast tank, triangular in shape, extending from the bottom of the ship to the between-deck. The sides of this were the sides of the ship; the after end of it was the collision bulkheads. It was twenty-four feet deep, and had a capacity of eighty-three tons of water. The angle irons, beams, strengthening bars, &c., which enabled the collision bulkhead to sustain the strain of the water against it, were on the inside of the tank, the face of the bulkhead showing in the No. 1 hold being smooth, except that the plates were lap-jointed.

The rivet which gave way was in the collision bulkhead, about two feet from the port side of the ship, and about three feet above the floor of the No. 1 hold. It was one of a series running horizontally across the bulkhead, by which a knee tie or strengthening brace which led a short distance across the bulkhead on the inside of the tank, and also along the side of the ship, was fastened. The shape of the knee tie is shown on the blue print (p. 144), by the letters "A" "B" on the port side. The rivet which broke was the one on the bulkhead at the 'midship end of the break. Only one rivet gave way (fol. 150); only one rivet head was off (fols. 37, 38, 48, 49, 51, 69, 71, 114, 115, 118, 121, 141, 150, 267, 269), although some of the others were strained so as to be weeping, that is, showing dampness (fol. 407) around them (fols. 140, 151) on the starboard side (fol. 271).

On leaving Trinidad, the steamer was trimmed two feet by the stern, her draft being 14 feet 10 forward and 16 feet 10 aft (fol. 284). On September 3d, to make the steamer "go easier—steam better" (fol. 304), the peak tank was pumped full of water. Soundings were taken both in the tank and in the No. 1 hold, during the process of filling the tank, but no leaking was discovered (fol. 335). On the following morning (fols. 32, 47, 323, 326), the sounding of the tank disclosed that the water had fallen in it; and on sounding the No. 1 hold, an accumulation of water was found there (fol. 282). The fore hatches were immediately removed, and on going below the chief officer found water coming through a rivet hole on the port side of the bulkhead, about two feet from the ship's side, and three feet above the floor. The hole was near the level of the cargo, which only partially filled the lower hold; it was immediately plugged. The officer then picked up from a bag lying immediately beneath the hole the head or outer end of a broken rivet; this showed a clear break; the appearance of the iron was fair (fols. 307, 308); the cargo was at once moved away from the sides of the ship, and holes were made in the limber boards to permit a freer flow of water to the bilges, and the pumps were at once started both upon the ballast tank and upon the No. 1 hold, both being cleared as quickly as possible. The remainder of the voyage was made without the use of any ballast forward.

It was contended in the Courts below and is argued here that the vessel was unseaworthy in two particulars: (1) in that one of the rivets of the bulkhead between the peak tank and the No. 1 hold was defective, (*a*) because the metal of the rivet was crystallized and weakened by too much hammering when originally headed up, and (*b*) because it was weakened by being put through holes which were untrue; and (2) in that the limber boards over the bilges were too tight. These charges of unseaworthiness were considered below although no allegations of unseaworthiness are to be found in the libel.

Both the District Court and the Court of Appeals found that all possible deligence had been used by the owners to make the ship in all respects seaworthy, and to have the

riveting sound and secure; that the cause of the rivet giving way was a latent weakness in it, due to the crystalline character of the iron, caused by an excess of hammering in the original riveting while the rivet was cooling off; that this weakness constituted a latent undiscoverable defect in the rivet, and that the loss and damage caused by the rivet giving way and letting the water out of the tank on to the cargo was within an exception in the bill of lading of "accidents to, or latent defects in, hull, tackle, boilers and machinery or their appurtenances."

Both courts found against the libelant on the other two contentions: (*a*) that the rivet was defective by reason of the holes being untrue, and (*b*) that the ship was unseaworthy because the limber boards were too tight. The suggestion of the present counsel (Appellant's Brief, p. 6) that "the courts below apparently passed this over in their examination of the facts" cannot be accepted, as both the points were elaborately argued in both the courts below by the late Mr. George A. Black, who appeared in both the lower courts in behalf of the appellant.

After the adverse decision of the Court of Appeals the libelant sued out this writ.

ARGUMENT.

The points which will be submitted in this brief, in support of the decision reached below, are:

(1.) Libelant's contractual rights are to be determined from the bill of lading; that she is not in privity with the charter-party under which the vessel at the time was hired out by the owner to the Trinidad Line (p. 7).

(2.) That the bill of lading is to be construed in accordance with English law (p. 9).

(3.) That the ship was not unseaworthy, either because of inequality in the strength of one rivet in the collision bulkhead which formed the after end of the peak tank, or because of alleged tightness of the limber boards (p. 10).

(4.) The loss is within the exception in the bill of lading, of "accidents to the hull, tackle, boilers and machinery, or their appurtenances" (p. 21).

(5.) That the loss is within the exception of "latent defects in hull * * * and machinery or their appurtenances" (p. 28).

(6.) That the introduction of such an exception is not prohibited by the second section of the Harter Act (p. 42).

(7.) The ship is relieved from liability for latent defects by the provisions of the Harter Act (p. 47).

(8.) If the loss was caused or contributed to by the negligence of those in charge of the steamer, in the mode of filling the tank, or of taking soundings, or of omissions to sound, such negligence was "in the management or navigation of the ship," within the meaning of third section of the Harter Act, which absolves the ship from all liability therefor (p. 50).

POINTS.

I.

THE CHARTER-PARTY BETWEEN JAMES KNOTT, OWNER, AND GEORGE CHRISTALL, CHARTERER OF THE VESSEL, HAS NO BEARING UPON THIS CASE. THE LIBELANT WAS NOT IN PRIVITY WITH IT AND OBTAINED NO RIGHTS UNDER ANY OF ITS STIPULATIONS. HER CONTRACTUAL RIGHTS ARE DEFINED IN AND ARISE UNDER THE BILL OF LADING.

A year prior to this voyage the claimant had chartered the Carib Prince to George Christall, of the Trinidad Direct Line Steamship Company, for the period of four years (p. 148). The steamer was engaged under that charter at the time of the accident. It vested the entire possession and control of the vessel in Christall, who operated her with his own servants and at his own expense. It was a demise charter. (*Scrutton on Charter Parties*, pp. 1-3; *Baumvoll* v. *Gilchrist*, 1892, 1 Q. B. D., 258;

Baumvoll v. *Furness*, 1893, App. Case, 8; *Meiklereid* v. *West*, 1 Q. B. D., 428; *U. S.* v. *Shea*, 152 U. S., 178; *Freed* v. *U. S.*, 11 Wall., 591; *Hooe* v. *Groverman*, 1 Cranch., 214; *Marcardier* v. *Insurance Co.*, 8 Cranch., 39; *Bramble* v. *Culmer*, 78 Fed. Rep., 497.)

Notwithstanding such a demise of the vessel, it has been held that she is liable *in rem* for the breach of a contract of carriage made for her by the charterer (*Schr. Freeman* v. *Buckingham*, 18 How., 182).

Libelant's bill of lading was issued by Christall (fol. 434). She declared on this contract in her libel (fol. 5), apparently on the theory that it bound the ship *in rem*, although not purporting to be issued by the master (The *Centurion*, 57 Fed., 412, 416). She alleged that the steamship was "engaged in business as a common carrier" at the time of the shipment (fol. 5). That allegation is inconsistent with the contention now put forward, that the goods were shipped upon a demised ship, under a charter-party containing an express warrant of seaworthiness, with which she seems to claim a relation of privity. Her rights, and the steamer's obligations to her, are to be determined from the bill of lading (*Iron Mountain Ry.* v. *Knight*, 122 U. S., 79, 92; *N. J. St. Nav. Co.* v. *Merchants' Bank*, 6 Howard, 344). She is not in privity with the charter or any of its stipulations; nor is she in position to claim any larger rights as against the steamer than she would have against the charterer with whom she contracted, on the terms, conditions and exceptions stated in the bill of lading.

It is alleged that the merchandise in question was libelant's property at the time of shipment (fol. 5). If this be true, the shipper was her agent for the purpose of shipment and to make the contract. It is presumed he had authority to make it in the form adopted (*Zimmer* v. *N. J. Central Ry.*, 137 N. Y., 460, 463; *Jennings* v. *Grand Trunk Ry.*, 127 N. Y., 438, 446); but no question can arise on this point, since the libelant adopted the contract and declared on it in her libel (fol. 5).

Moreover, this charter-party is not in evidence except for a qualified purpose. The libelant had examined as witnesses Ernest C. Legge, master, and Edward

Keeys, engineer, and certain entries of the engineer's log book had been put in evidence by the libelant (p. 43). The claimant thereupon proved that the officers and engineers of the ship were not servants of the shipowner (fol. 256), and offered in evidence the charter-party, "for the purpose of showing that it is only a charter of the bare ship and that all of the members of the crew and officers are servants of the charterer, not of the shipowner" (fol. 257). It was not introduced by the claimant for the purpose of varying, in any way, the contract between the libelant and the ship, as agreed in the terms of the bill of lading (p. 145). The bill of lading made no reference whatever to the charter-party.

II.

THE BILL OF LADING SHOULD BE CONSTRUED BY ENGLISH LAW.

The contract of carriage declared on in the libel (fol. 5) was signed at Trinidad (fol. 434), a British possession, for the transportation of goods upon a British steamer. The damage occurred on the high seas, in an early stage of the voyage. In these circumstances the contractual rights and obligations of the parties, under the bill of lading, are to be determined according to English law (*Liverpool St. Nav. Co.* v. *Phœnix Ins. Co.*, 129 U. S., 397; *Fonseca* v. *Cunard S. S. Co.*, 153 Mass., 553).

By a stipulation entered into on the trial in the District Court (fol. 19), "it is admitted that under the English law, the language of the bill of lading made a valid contract."

III.

THE STEAMER WAS NOT UNSEAWORTHY, NOR DID ANY PERSONAL NEGLIGENCE OF THE OWNERS CONTRIBUTE TO THE LOSS.

1. *Character and construction of the vessel.*

The Carib Prince was substantially a new vessel. She was built to order for Mr. George Christall, who operates a line of steamers, known as *The Trinidad Line*, from New York to Trinidad, in June, 1893 (fols. 437, 20), three months before this accident. She was an all steel steamer, of 1,304 tons net register, and of 2,500 tons dead weight capacity (fol. 457). She was built by builders of the highest reputation in England, and at an expense considerably in excess of the usual cost of vessels of this class (fol. 413). She was designed to be, and was, an exceptionally fine vessel.

The utmost diligence was used by the owners to have her rightly built, and by the builders to have this particular bulkhead properly erected and soundly riveted. The specifications for the vessel generally and for the riveting, bulkheads and water-testing were very stringent (fols. 463, 468), and were in excess of the requirement of Lloyd's Register (fols. 237, 240, 241). She was built in accordance with these specifications (fols. 250, 236, 184), by builders of good standing (fol. 39), under the supervision of a Lloyds' surveyor, and the owners, architect and surveyor, at a cost considerably in excess of that of an ordinary steamer of her class (fol. 413). The workmanship of the vessel was very good (fol. 156).

The builders obtained and used the rivets most widely used in England (fol. 120). Not every one, indeed, but some of them were tested as to quality by bending them cold and flattening them cold (fols. 171, 172). The rivet holes were spaced according to Lloyds' rules for watertight work (fol. 175), five and a quarter inches from centre to centre (fol. 190). Wherever the holes in the plates were not perfectly fair, they were rimed out with a rimer (fols. 180, 198,

215, 230, 246), until they were fair, and then a larger rivet was inserted, one of seven-eights of an inch instead of three-quarters of an inch diameter (fol. 199). The "drift pin," which libelant's expert Quinn ignorantly supposed was used to stretch five-eighths inch steel plates so as to make untrue holes fair, was not used in any such way, nor for any such purpose. "It is put through to "clean the hole when necessary; it is put in oily waste "and put through to see that the thing is perfectly "clear" (fols. 194, 193, 178, 212, 243-4). The men who did the riveting in this tank were specially selected for their skill in watertight work, and some of them men of thirty years' experience (fols. 186, 208, 220, 236), and their work was supervised generally by one of the builders (fol. 170); immediately, by a foreman riveter of eighteen years' experience (fols. 184, 192); by the owners' inspecting surveyor, who was at the ship about three hours a day (fols. 204-10); by a Lloyds' surveyor (fol. 220), who was there nearly every day and saw much of the riveting done (fols. 224, 225); and by the owners' architect (fol. 235), who visited the ship two or three times a week (fol. 242) and saw the rivets after they were headed up. Every rivet on the bulkhead was tested with a hammer by the foreman riveter (fol. 187) and by the owners' inspector (fol. 206); and nearly every rivet was subjected to the like test by Lloyds' surveyor (fol. 221). This test it is proved and not denied, would have detected any crystalization of iron in a rivet from too much hammering; but on the tests no such rivet was found (fol. 197).

From this undisputed proof it is fairly to be inferred that the rivet broke from undue strain rather than from inherent weakness. The bulkhead was further twice tested with the water test in the presence of Lloyds' surveyor (fols. 222, 187, 188, 173, 206, 207, 237). The tank was filled to about a foot above the main deck, and a pressure of ninety-six and two-thirds tons exerted against the bulkhead, an excess over Lloyds' requirements (fol. 237). The pressure thus exerted on the bulkhead was increased by the fact that the vessel was then lying on an incline of five-eighths of an inch to the foot, or more than ten feet by the stern (fol. 206). The bulkhead under

these tests showed no sign of weakness or of leaks (fol. 238). After the only occasion when the tank bulkhead could possibly have been strained, during a hurricane in the August preceding the accident, the engineer went down inside the tank and examined the rivits on the bulkhead for over an hour to see whether there had been any starting or strain. No evidence of any strain was apparent. The cement coating on the bulkhead showed no sign of having started (fols. 130, 135, 138).

Notwithstanding all these efforts, it is claimed that the iron of the rivet in question had become crystalized by a trifle too much hammering, after it had cooled off. This was testified by *libellants' witness* Keyes:

Q. Are you familiar with qualities of iron, to say whether this rivet is of good quality or not (Claimants' Exhibit 6)? A. I am, sir.

Q. Is it good or not? A. No, sir.

Q. What is its defect, in your judgment? A Inferior iron, short and brittle, without a fibre.

Q. Has that been annealed? A. Yes, sir.

Q. Might not this condition of fibre have been produced by too much hammering when it was annealing? A. Yes, sir.

Q. When a line of rivets are put in in construction they usually work on three at a time, do they not? A. Yes, sir.

Q. And every time they put in a new one they tighten the one behind it, do they not? A. They tighten the second one behind it; yes, sir.

Q. As the iron is cooling, if the second one behind is hammered too much that will produce a crystalline character in the iron, will it not, and will give it the appearance of being short and brittle? A. Yes, sir.

Q. That is the appearance that this had? A. Yes, sir.

Fols. 142-144.

There was no other evidence to this effect; and it is to be noted that this witness did not express the opinion that the rivet was weakened so as to be unfit for its purpose; indeed, he did not say it was weakened at all.

2. *The claim that the rivet holes were untrue was not sustained.*

It was contended in the proof that the rivet holes had not been even when the rivet was inserted, but had apparently been made so by force (fol. 355), although libelant's evidence as to this was not harmonious (fols. 147, 353). One Quinn claimed that if the two holes were out of line $\frac{1}{8}$th of an inch the rivet would lose one third of its strength (fol. 371). Saunders, a witness for claimant, says the irregularity of the holes, if anything, did not exceed $\frac{1}{16}$th of an inch, which would not affect the strength of the rivet at all (fol. 255).

Although libelant's witness Keyes stated the holes in the different plates were not perfectly true, he does not state the extent to which they were out of "fair," nor that this weakened or had anything to do with the giving way of the rivet. On the contrary, his evidence is that it broke from another cause.

Probably what Keyes took for a want of fairness in the holes was only a springing apart of the plate and knee tie when the rivet broke, leaving a space between them, which may have felt like an irregularity in the holes. This rivet was at the midship end of the knee tie. The tank was of triangular shape. The heaviest pressure of the water coming against the midship part of the bulkhead would tend to spring it away from the knee tie on the inside of the tank after the end rivet was gone. This also accounts for the quantity of water that came through the hole, although a part of the rivet remained in it. The part of the rivet which had to be knocked out was probably in the knee tie. No witness says any part of it was seen by him in the bulkhead plate.

This explanation is borne out by the testimony of Saunders, who stated that he put his finger through the holes, in New York, before the bulkhead was repaired, and found them substantially fair (fols. 252 255). Libelant attempted to disparage this evidence by the suggestion that the holes had been cut out at that time; but there is no evidence to that effect. The riming out, if there was any, occurred at the

time the new rivets were put in (fol. 148), but at the time Saunders saw the tank the rivets had not been put in, nor had preparations for putting them in been made (fol. 152). The holes at that time were filled by a bolt with a nut on it, which was taken off for examination (fol. 253).

The evidence of the builders (*ante*, pp. 10, 11) shows that the holes were not untrue. They could not have been. The holes through the plates were $\frac{3}{4}$ inch holes, and the rivets put in were $\frac{3}{4}$ inch rivets. If the holes were not true, the rivets would not have gone in. Wherever the holes were not perfectly true, they were made so by putting in the rimer and riming out the holes until they became true; and a larger rivet was then inserted (fols. 180, 198, 215, 230, 246, 199).

The use of the drift pin was exclusively limited to the purpose of cleaning the holes, in case any dirt or rust may have accumulated in them; that is, before the rivet is put in, the drift pin, bathed in oil, is inserted in the holes (fols. 194, 193, 178, 212, 243-4).

It is self-evident that if the holes had been an eighth of an inch out of line, as suggested by Quinn and Clarke (wooden shipmaster), the use of the drift pin would not have sufficed to stretch a five-eighths of an inch cold steel plate so as to bring one hole fairly over the other. The evidence of the witness Quinn being contrary to common knowledge, in an essential particular, should be received with caution (The *Thomas Melville*, 31 Fed., 486, 487).

Examined by the Court, even Quinn himself admitted that he constantly passed rivets which were not perfectly true as good and fair work (fol. 374). The proof is wholly insufficient to support a finding that the holes were untrue to an extent that materially or substantially affected the strength of the rivet; and both of the courts below have so found.

3. *There was no unseaworthiness with regard to the flooring over the bilges.*

In the appellant's brief only a part of the evidence referring to the tightness of the bilges is referred to. On the

whole of the evidence it is perfectly clear that the timber-boards were not water-tight; that water was passing down through them at the time the carpenter bored the holes; and that the object of boring the holes was not to permit water to find its way to the rose boxes in the bilges from which it had been previously excluded, but was simply an alternative means adopted of letting the water in fast, instead of moving enough of the cargo to permit the limber boards to be raised (fols. 30, 34, 36, 37, 44-5, 326, 327, 332). The evidence in support of this charge of unfitness was too weak to call for notice in the opinion of the Court below.

4. *There was no negligence in failing to inspect the riveting after the August hurricane.*

It appeared from the evidence that on the outward passage towards the West Indies, ten days before this cargo was laden on board, the vessel had passed through a severe hurricane; and the suggestion was made that possibly the rivets may have become strained by the working of the vessel in that storm. The evidence of Keeyes, however, showed that such was not the case; that the rivet had not broken from strain, but from the crystalline character of the iron (fols. 142-144). Nevertheless the experience of the vessel in that storm affords the libelant a text for preaching a sermon upon the duty of minute examination of the rivets of the vessel and of the application of the hammer test to each rivet in every case after a steel steamer has passed through a storm, and for the omission to make such a test in the present case, a charge of negligence and of unseaworthiness is brought forward. Unfortunately for this argument, it appeared that a most careful examination of the particular place where this rivet was located was made by the engineer after the storm. It is true that he did not go down into the tank "for a practical examination," as the libelant points out; but after he got down there, he made it his business to make one. Libelant's own evidence as to this ought to conclude her theory on this point:

Q. Did you make an examination of the interior of the tank (after the hurricane)? A. Not a practical examination. I made an examination just to satisfy myself, to have a look at the formation of the tank principally; it was the first time I had seen it; *I didn't go with the intention of examining whether there was any damage or not, but I made that my business when I was down there.*

Q. Did you examine to see whether there was any damage? A. Yes, sir.

Q. Did you look at the collision bulkhead? A. Yes, sir.

Q. Did you look at the knee tie? A Yes, sir, wherever there were rivets.

Q. Was there any coating or wash on the forward side of the bulkhead? A. Yes, sir, a coating of Portland cement.

Q. Was that over all the rivets? A. The rivets and the bulkhead as well.

Q. Did you notice that any rivets were started on the inside? A. I couldn't tell that any had been started.

Q. Had the cement been started? A. Not that I could see.

Q. You say you examined wherever there were rivets on the inside of the tank? A. Yes, sir.

Q. How long were you down there? A. Upwards of an hour (fols. 130-131).

Q. On what day was it that you went down into this tank first after this storm? A. On the morning of the 22d of August.

Q. The vessel was then at sea? A. Yes, sir.

Q. Did anybody go with you? A. No, sir.

Q. And it was your first visit to the interior of the tank? A. Yes, sir.

Q. How did you get down into it? A. Through a manhole door.

Q. Was there a ladder to go down into it? A. Yes, sir; three ladders.

Q. Inside? A. Inside.

Q. Permanent? A. Permanent ladders.

Q. Did you carry lights with you? A. I did.

Q. In what shape? A. In the shape of a torch and a lantern.

Q. And you say you found it all lined with Portland cement? A. Yes, sir.

Q. How thick was that lining? A. A heavy wash—washed with a solution of cement in paste form.

Q. What would you take that to mean in thickness, a heavy wash? A. It materially differs; depends upon the surface it is put on. Put a coat of cement about one-six-

teenth of an inch thick, and about the rivets would be thicker and clumsier.

Q. You found nothing to indicate any starting of the cement? A. According to appearances.

Q. Well, you saw it and you are telling us what you saw? A. Yes, sir.

Q. Was there cement on all the sides of the tank as well as the bulkhead? A. Yes, sir.

Q. And on the floor of it? A. There is no floor in it.

Q. It comes down to a flat surface on the bulkhead side, doesn't it? A. No, sir; it is wedge shaped at the bottom of the ship.

Q. Was that portion of the tank which formed the bottom of the tank also covered with cement? A. Yes, sir; not only with a wash but with a body of cement.

Q. Was the top of it, which is the underside of the between-decks there, also washed with cement? A. I am not sure of that.

Q. Could you, by means of these ladders, examine every portion of that interior? A. Yes, sir; and without the assistance of the ladders.

Q. Why, part of it is twenty feet high, isn't it? A. Yes; but you have got intermediate stringers that you could stand on.

Q. This particular beam to which this angle iron is attached is inside of this tank? A. Yes, sir.

Q. At what height above the bottom of the tank is that beam? A. From the ship's bottom?

Q. Yes? A. Six feet or more.

Q. Did you look at that beam at all? A. I was on top of it.

Q. Was that also covered with cement? A. Yes, sir.

Q. Was the cement perfect there? A. Apparently (fols. 134–138).

The notion that every rivet on a ship must be tested with a hammer or by water pressure after a storm is certainly novel. After such a test is applied to the rivets when first inserted, it is not supposed that any further hammer tests are necessary. Certainly, nothing in the evidence shows it is ever practiced; nor does the evidence show that it would have been effective in the present case to discover the weakness of this particular rivet. Such a practical matter should not be left to argument; it should be the subject of expert evidence (*Union Ins. Co.* v. *Smith*, 124 U. S., 405; *Eastern Transp. Line* v.

Hope, 95 U. S., 298. The evidence so far as it goes tends to show the contrary. The rivet head, which was picked up by mate Scott, showed that the break across the iron was a fair break (fol. 307), and, as it broke at the bottom of the countersunk part of the head, it is evident it could not have been broken in August and still have stayed on the face of the bulkhead. Its own weight would have caused it to drop out.

The conclusion must, therefore, be that the August hurricane had nothing to do with the accident, which was really caused either by a latent defect in the material of the rivet or by the negligence of the ship's crew in filling the tank at sea, under the circumstances then existing, in the manner adopted.

5. *The alleged brittleness in the metal of one of the rivets in the collision bulkhead, if true, did not amount to unseaworthiness.*

This is not a case where the latent defect became, during the voyage, the cause of the ship's disablement. In this respect it differs from the Caledonia, where the defect in the shaft resulted in the ship becoming helpless. The Carib Prince was seaworthy, in every sense, for the voyage upon which she was bound. She was a practically new steel vessel, a very superior ship for her class, both in design and in the manner in which she was built. She started upon the voyage from Trinidad to New York in the same trim in which she had made the outward voyage from New York to Trinidad, viz., two feet by the stern (fol. 79). Shortly after the outset of the voyage, without previous intention to do so or any present necessity but simply for the purpose of gaining an additional quarter of a mile an hour speed, the master concluded to fill up his peak tank (fols. 79, 80). To save time, he filled it without stopping the ship, and at a time when by reason of cross sea and beam wind, she was rolling. It is proved and not disputed, that this was improper navigation (fols. 397, 398). In consequence of it, one of the rivets in the bulkhead broke, creating a leak, through which water poured upon the libelant's cargo. The break-

ing of the rivet in no way affected the general seaworthiness of the ship. No more water could come into her in consequence of the leak than was already in. The only result of the leak was that a part of the water went from the peak tank into the No. 1 hold upon the libelant's bitters. The ship was in no way imperiled; the water was promptly pumped overboard, both from the peak tank and the No. 1 hold, and the ship proceeded in safety, and at substantially the same speed and trim, on her voyage towards New York.

One witness testified that the metal of the broken rivet showed a brittle or crystalline character, which may have been due to too much hammering in the original riveting as the metal was cooling off. On this proof, both the Courts below have found that the damage resulted from a latent defect in the rivet, and both have said that this defect constituted unseaworthiness (pp. 476, 212). It is not necessary, we submit, to resort either to the doctrine of latent defect, or to unseaworthiness, in the determination of this controversy.

Plainly, it is a great stretch in the use of the term to say that such a trifling defect of construction in one of the partitions of a huge steel hull amounts to unseaworthiness. Seaworthiness in the hull of a vessel requires nothing more than reasonable fitness for the voyage. In *Steel* v. *State Line*, 3 App. Cas., 72, Lord CAIRNS said:

"By 'seaworthy' I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and loaded in that way, may be fairly expected to encounter in crossing the Atlantic."

In *Du Pont de Nemors* v. *Vance* (19 How., 162, 167), Mr. Justice CURTIS defined this obligation as follows:

"To constitute seaworthiness of the hull of a vesssel, in respect to cargo, the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage, without damage to the cargo under deck. If the vessel during the voyage has leaked so much as to injure the cargo * * * one mode of testing seaworthiness is to ascertain what de-

fects occasioning leakage were found in the vessel at the end of the voyage, and then to inquire which of those defects are attributable to perils of the seas encountered during the voyage, and which, if any, existed when it was begun; and if any of the latter be found, the remaining inquiry is whether they were such as to render the *vessel incompetent to resist the ordinary attacks of the sea* in the course of the particular voyage, without damage or loss of cargo."

The specific defects in that case were "two worm holes in her bow about three-eighths of an inch in diameter, one about three streaks from the keel, the other a little higher up" The vessel was new, and the Court found there was no doubt that the worm holes were in the plank when put in the vessel, but for some cause remained undiscovered (p. 167). The ship had also strained and started a butt, owing to perils of the sea. The question before the Court was whether the leak from the worm holes amounted to unseaworthiness so as to deprive the owner of the benefit of the exception of sea perils. On this point the Court (p. 168) held:

"We do not think the existence of the worm holes amounts to unseaworthiness."

In the *Sandfield* (Appendix II., *post*), where the question was whether a rivet in the ship's side, defective because of unequal strength to that of its neighbors, made the ship unseaworthy, BROWN, *J*., said:

"It is likely enough that the cant given to the rivet by "driving it through the overlapping holes, which were "not quite true, and the cant given to the clinch at both "ends, might diminish its endurance by subjecting it to "an unequal strain and increasing the injurious effects of "the vibration of the plates against it. If such was the "fact, *any such mere inequality in the strength of the "rivets does not amount to unseaworthiness*, or a violation "of the provision of the charter that the ship shall be "tight, staunch and strong"

In this case the proof of an act of improper navigation—the filling of the tank while the ship was under headway and rolling—deprives the Court of any means of judging

whether the brittleness of the rivet would have constituted a defect, if the tank had been subjected to only a proper use. An inference of unseaworthiness would only arise from the giving way of the rivet while subjected to the ordinary uses, without the concurrence of another effective cause. On this state of the proofs the presumption of seaworthiness (the *Warren Adams*, 74 F. R., 413, 415) should outweigh the possible inference that the brittleness of the metal in the rivet constituted a defect which might have produced similar results in a proper use of the tank. The mere fact (if a fact) that the rivet was brittle is not enough of itself to condemn it; nor is the fact that it broke. If, although brittle, it was strong enough for proper use (and this is not denied in any of the evidence), the obligation of the owner would be satisfied. The law only requires of a shipowner a vessel reasonably calculated to endure the *ordinary* strain of the navigation in which she is engaged. If his vessel be reasonably sufficient for the voyage he is not to be held liable, although a stouter ship (or rivet) would have outlived the peril (*Maclachlan on Shipping*, p. 459).

6. It is doubtful whether the allegations of unseaworthiness can be considered by the Court, in the absence of allegations in the libel in that behalf (*Lawrence* v. *Minturn*, 17 Howard, 100, 110; *McKinlay* v. *Morrish*, 21 Howard, 343).

IV.

THE CLAIM IS WITHIN THE EXCEPTION OF "LOSS OR DAMAGE FROM * * * [AN] ACCIDENT TO * * * [THE] HULL OR ITS APPURTENANCES" AND THE "ACT, NEGLECT OR DEFAULT * * * OF * * * MASTER OR CREW, IN THE MANAGEMENT OR NAVIGATION OF THE SHIP."

It has been shown that the ship was entirely seaworthy, and in every way fitted for this voyage, without using the peak tank at all. In filling it to bring the vessel's head

down, six or eight inches, and make her steam a little better as he expected -a matter of four or five miles in twenty-four hours—the rivet gave way, and water poured in upon the cargo. The loss is apparently within the language of the exception of "accidents to hull or their appurtenances."

In carrying out his whim of using the tank upon this occasion, the captain filled it at sea without stopping the ship. The evidence is undisputed that this was improper use of the tank and wrong mode of filling it. There is hardly a doubt that the tank broke from the way in which it was filled. The act of filling it in this way, was an "act, neglect or default of the master or crew in the management or navigation of the ship," within the second clause of the exception. Both of these clauses of the bill of lading are valid by English law, which is to be here applied, and the negligent filling of the tank is also covered by the third section of the Harter Act.

(*a.*) It is perfectly clear from the testimony that there was no actual need of filling the peak tank when it was filled at sea. The master, who was not the servant of the shipowner (fols. 256, 439), attempted to justify his use of the tank by saying it was to correct the trim; but from his evidence, the trim was not unusual (fol. 97), and both he and the mate concede that it was filled in the expectation of bringing the ship's head down only six or eight inches, to make a trifling gain in speed.

Mate Scott (fol. 304), said:

"Q. What was the occasion of filling it? A. Because the ship was so much astern, we thought she would go easier—steam better."

Captain Legge (fol. 40) testified:

"Q. How did you come to fill up this tank on the third of September? A. On leaving Grenada, the vessel was three (two) feet by the stern, and proceeding to New York, every day using coal—burning coal—puts her more by the stern.

"Q. It lightens her up forward? A. I considered it absolutely necessary to fill this ballast tank to keep the vessel in trim.

"Q. Had you a cargo on board? A. Yes, sir.

"Q. What was the draft when you left Grenada? A. Fourteen feet ten forward, sixteen feet ten aft.

"Q. Had you had a cargo on the voyage from New York to Trinidad also? A. Yes, sir."

(Page 27). "Q. What was her draft on the voyage down? A. Fifteen feet three forward, seventeen feet four aft (two feet one inch by the stern).

"Q. On the voyage from Trinidad or Grenada to New York, on which this occurrence happened, her draft was fourteen feet ten forward and sixteen feet ten aft before you put the water into the tank? A. Yes, sir.

"Q. When you put the water into the tank, what was her draft? A. We were at sea then, and we could not as certain exactly the draft; that tank ought to tip her six or eight inches.

"Q. When you emptied the tank, you came to New York without anything there? A. Yes, sir.

"Q. You did not shift any cargo? A. No, sir.

"Q. And did not change the trim of the vessel at all? A. I had no other way to do it.

"Q. And you arrived in safety? A. Yes, sir; only she didn't steam as fast; that is the only thing; the runs in the log book will show that.

"Q. Give me the precise hour at which this tank was filled up on the third of September? A. 10 P. M. of the 3d; it was emptied at 6 A. M. of the 5th. The tank was filled for a period of thirty-two hours.

"Q. What was the speed you made while the tank was filled? A. Two hundred and forty-seven miles the first twenty-four hours; the next day's run was two hundred and forty-six miles, an average speed of about ten and a quarter miles.

"Q. What was the speed during the next twenty-four hours? A. Two hundred and forty-one.

"Q. That was when the tank was empty? A. Yes, sir.

(*b.*) It scarcely needs proof to show the imprudence of taking eighty-three tons of water into the peak ballast tank above the level of the cargo, merely for the sake of making a trifling gain in speed. This ballast tank, as its name implies, is designed for use when the ship is empty, not when she carries cargo. The experience of other cases mentioned in Mr. Congdon's evidence, shows that the use of such a ballast tank is hazardous under the most favorable circumstances. The triangular shape

of the tank, and its location, the great pressure that necessarily comes upon it in the course of filling, unless the ship is perfectly still, make obvious the impropriety of the use made of the tank. It does not rest upon inference from the event, but upon common knowledge. We have clear, positive and undisputed proof upon the record, credible in itself, and according with good sense, that it is negligence to the degree of rashness, to fill such a tank in a sea way, or in any state of the weather, without stopping the ship.

Thomas Congdon, a shipbuilder by training and Lloyd's surveyor for thirty-eight years (fols. 149, 150), testified on this point as follows (fols. 397, 398):

"Q. Do you know whether there is any rule amongst navigators as to filling tanks at sea; whether a vessel should be stopped, or whether they can fill them in motion? A. The rule of common sense is the only rule I know about. It is a very unwise thing to fill a tank at sea.

"Q. What do you say as to the prudence of filling a tank with the ship going ahead? A. I should say it was a very improper thing to do.

"Q. Why? A. Because when the tank is partly full of water and the ship is in motion, it swashes up, and is liable to break on (down) the bulkhead. I have seen a bulkhead knocked flat on the ship's bottom, where the tank has not been full, the ship rolling and water swashing knocked the bulkhead down."

Cross-examined (fol. 404), he said:

"Q. Do you know anything about hydraulic pressures? A. Tell me what you want to know?

"Q. Do you know how many additional pounds or tons pressure is brought on a bulkhead by the increase of one foot in a stand-pipe (an allusion to the mode of testing tanks in new ships, fol. 155)? A. Yes, sir.

"Q. In a bulkhead of the size of that of the tank of the Carib Prince, how much additional pressure would be brought on that bulkhead? A. I must know the area of the bulkhead.

"Q. You saw the bulkhead, didn't you? A. I will tell you that about six or seven or eight inches rather, in this standpipe, would be about a pound pressure on each square inch of the bulkhead, and you can calculate the whole thing.

"Q. Would a pressure of that much on that bulkhead, be as great as, or greater than, the pressure caused by the water being in movement, when the tank was not full? A. Nothing to compare it to; you can't compare the two.

"Q. You think there is nothing in the nature of forces that you can compare between pressure and impulse? A. The swash is the more severe of the two on the bulkhead, most decidedly.

"Q. If the sea is smooth, and the steam vessel is not rolling, would the tanks suffer any extraordinary strain by being filled at sea? A. If the water is perfectly smooth, of course it could not suffer. If there is motion of the ship, either rolling or plunging, it naturally would.

"Q. If there is no such motion, there is no danger of that? A. Quite so.

"Q. It is due to the surge of the water coming with an impact on the bulkhead? A. Exactly.

"Q. Would not such an impulse as that have a tendency to snap off a great many heads of rivets? A. I have seen a bulkhead knocked right down.

"Q. That meant a great many heads were torn down? A. I don't know what preceded it."

Frank Martin, a marine engineer and surveyor of fifteen years' experience, also a shipbuilder by training (fol. 268), testified (fol. 272):

"Q. What do you say as to its being a prudent thing to fill such a tank without stopping ship? A. I say it is not prudent.

"Q. Why? A. The immense volume of water there is pressing against the bulkhead with the motion of the ship going through the water."

Captain Saunders, a master mariner, who had been in command of steam vessels with this class of tank (fols. 251, 258), now superintendent for the Prince Line, which operates about fifty steamers (fols. 251, 252), testified (fol. 258):

"Q. Can you say whether or not it is a prudent thing to do, to fill the peak tank at sea without stopping the ship? A. It is not. The proper thing is, a ship should be stopped and perfectly still. It is a very unwise, unsafe thing to do on account of the strain, the motion of the water causing heavy strain on the bulkhead."

This, as Mr. Congdon well said, is "the rule of common sense." It is also the rule of which a skilled master should know and observe. It is enjoined upon mariners by the hand books issued for their guidance. Thus, in Mitcalfe's Suggestions to Mariners (Newcastle, 1886), it is said:

"No. 29. The captain of a steamer well loaded with grain or other perishable cargo, disc just awash, should not be persuaded while steaming at sea to fill any of the ballast tanks under the cargo; to alter the trim and increase the speed; success is doubtful at the best, while even if the tank is tight to commence with, the engineer will probably leave the sea cock open after the tank is full and strain it. Certainly a claim for damage to cargo will result and may, perhaps, be the most fortunate result of a reckless and wilful act of improper navigation."

"No. 30. It is time enough to think of filling the tanks *when required to stiffen the vessel.* * * * Let the captain think twice before doing it, and reflect that he opens a three inch hole in one bottom without seeing the other one, or knowing where the water goes. Being in charge of many lives and of valuable cargo, he will do well to watch this risky operation from start to finish and himself order the sea cock to be closed, or see it done, or he may find himself personally liable if damage results from neglect of this precaution.

"No. 109. Remember also, that it is exceedingly dangerous to run up your ballast tanks at sea when the vessel is rolling, as there may be a diffiulty *in filling* them or the tank top may be injured by the water rushing from side to side."

(*c.*) It was a fault that the ship was not stopped (fol. 305) when the tank was filled. She was then rolling. In the engineer's log (p. 162), during the watch from 8 P. M. to midnight of September 3d, he records: "Pumped up the fore peak tank" and "ship rolling." This is also confirmed by the mate's log (p. 159), which shows the course in that watch to have been N.W. by N.½N., and the wind a "strong breeze" from E.N.E.—a point abaft the beam. If, in these circumstances, she rolled appreciably (as would be only natural), it is reasonably certain she was also pitching in some degree; certainly enough

to cause great swashing about of the water in the tank during the process of filling, and thus bring a heavy strain on the bulkhead, at the acute angles formed by its junction with the rounding bow of the ship's sides. The fault of filling the tank while the ship was in motion is within the negligence clause of the bill of lading, which since the public policy of this country has been changed by the Harter Act, may now be here upheld.

Mr. Congdon points out that the pressure from water in movement, in such circumstances, is very far greater than that arising from the usual standpipe tests (fols. 403, 404), by which the adequacy of bulkheads for reasonable and proper use are tested (fols. 155, 222).

(*d.*) A strong inference of the original sufficiency of the rivet for any proper use of the tank, and that it was broken by an improper use, arises from the evidence as to care used in the original riveting, and from the fact that it successfully passed all the usual tests for strength. There is no evidence that the broken rivet showed any flaw or defect that might not be in any piece of metal which has to be hammered while cooling. The defect of brittleness described by Engineer Keeys, was always there from the time the rivet first cooled off, after being hammered. Nevertheless, it did not weaken the rivet so that it lacked the required strength as measured by the usual tests, which have not been attacked by the libelant, either for their thoroughness or sufficiency. It was also strong enough to hold through the hurricane experienced on the previous voyage—one of the severest storms of a stormy region. We know it was not affected then because the head did not break off until this voyage, when it was found on top of the cargo, under the leak, with the metal showing a fair break. It was broken in the countersink, a depression in the side of the plate, into which the head was driven up in riveting. Its own weight would have caused it to drop, if broken before, and it clearly could not have received any strain sufficient to break it before, because the cement coating on the inside of the tank was found, on examination after the hurri-

cane, to be neither broken nor cracked (fols. 130, 131, 134–138).

(*e.*) This train of circumstances leads strongly to the conclusion that a sufficiently good rivet here gave way, owing to a wrong use made of the tank, and that accordingly the loss should be regarded as due to an accident to the hull or its appurtenances, caused by a wrong act of management or navigation by the master, within both those exceptions in the bill of lading. The loss appears to be clearly within the language of the exceptions, which are admitted to have been lawful where made, and which our recent legislation now permits to be upheld in this Court. Where a vessel is generally seaworthy, but an accident results from the giving way of some appliance which in no way affects her seaworthiness, but only results in damage to cargo, it is unnecessary to resort to the doctrine of the implied warranty of seaworthiness in order to reach a just conclusion as to liability. If there is no appropriate exception in the bill of lading to cover it, the ship should respond upon other principles. If there is such an exception the ship should have the benefit of it (The *Curlew*, 51 F. R., 246; 8 U. S. App., 405; The *Miranda*, L. R., 3 Ad. & Ec., 561; The *Virgo*, 3 Asp. Mar. Cas., 285; The *William Lindsay*, L. R., 5 P. C., 338).

V.

The loss is within the exception of "latent defects in hull, machinery or their appurtenances."

This exception is broad and specific enough to exempt the vessel from the damage, whether the defect in the rivet amounts to unseaworthiness or not. It is plain, unequivocal, and the usual form of exception from latent defects that is found in the great majority of ocean and inland bills of lading.

I. The appellant argues that the *Caledonia* (157 U. S., 124) is opposed to the contention that this exception may be viewed as a modification of the implied warranty of seaworthiness. We must, therefore, at the outset, point out the essential grounds of difference between the two cases.

The grounds on which the decision of the Caledonia proceeded are: (*a*) that the exception of "steam, boilers and machinery, or defects therein," was not sufficiently definite and specific to be a modification of the implied warranty of seaworthiness; and (*b*) that as the exception formed part of a long enumeration of excepted causes of damage, all the rest of which related to matters subsequent to the beginning of the voyage, this one must be treated as equally limited in scope.

(**a**) The exception of "*latent defects in hull, machinery and other appliances,*" contained in this bill of lading, is more specific and definite than that of "defects in machinery" in the *Caledonia* case. The exception now under consideration is an express modification of the implied warranty of seaworthiness in the ordinary meaning of words. While it is doubtless correct to say that stipulations in bills of lading are construed most strongly against the shipowner, nevertheless, this doctrine is not to be carried to the extent of substituting for the plain intention of the parties as fairly expressed in their contract, a fictitious presumption of their intention. The aim of the Court must be, as stated by Lord HALSBURY, in *Hamilton* vs. *Pandorf* (12 App. Cas., 518, 524), "To give effect to all the words that the parties have used to express what this bargain is"; or, as stated by Mr. Justice NELSON, in *Bulkeley* v. *Naumkeag Co.* (24 How., 386, 394), "*We must look to the substance and good sense of the transaction;* to the contract as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained in order to determine the scope and extent of them."

Looking to the "substance and good sense of the transaction," we find that the words employed were apt to relieve the shipowner from defects existing in the ship at the time the contract of carriage was entered into; that the implied warranty of seaworthiness, as a warranty against latent defects, is a harsh rule from which the shipowner would naturally desire to be relieved; and that the mutual intention to give such relief would be quite natural in view of the fact that Congress, by the Harter Act (*Post*, Appendix I.), has given relief from it in a large class of cases. It is to be presumed that insurance policies have been reformed to meet the increased risk put upon cargo by the Harter Act, and that insurance against latent defects is now readily obtainable. The cargo owner receives a consideration for the exception in a diminished rate of freight (The *Wells City*, 61 Fed., 857, 859).

The four Judges who have already heard this case have concurred in holding that the exception of latent defects was an express modification of the implied warranty of seaworthiness. BENEDICT, *J.* (p. 168), held:

"The law of England, as declared in the case of the Cargo *ex Laertes* (12 Prob. Div., 187), is to the effect that by the laws of England, such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the vessel, if due diligence is exercised by the ship owner. Applying that law to this case, it follows from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libelant's cargo because the danger arose from a latent defect in the rivet which gave way, within the exception in the bill of lading, under which the merchandise was carried."

SHIPMAN, Circuit Judge, delivering the opinion of the Court of Appeals (p. 212), said:

"The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is, whether this language does not necessarily mean defects

existing at the time of shipment, and therefore whether it does not clearly and even expressly exclude unseaworthiness arising from such defects. The only case in which the effect of an exemption of latent defects is discussed, is the *Laertes*, 12 Prob Div., 187, but in that case, the language of the bill of lading was 'latent defects * * * even existing at time of shipment,' so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that 'latent defects' must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been discoverable at the time of the shipment. It could not in its nature have been capable of discovery then, and have become capable of evading discovery subsequently. A construction which should say that 'latent defects' meant only those which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the school men; and if latent defects existing upon the voyage are exempted, those existing at the time of shipment are included, for they are the same. We concur with the experienced District Judge that the exception 'limits the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner.'"

We submit, with deference, that the exception in the *Laertes* case, of "latent defects, even existing at time of shipment," expresses no further thought than the simple exception of "latent defects." The word "latent" speaks in the present tense. *Latens*, from which we derive the adjective *latent* is the present participle of the verb *lateo*, to lie hidden. In the Standard Dictionary *latent* is defined as "Not visible or apparent: *with the implication of existence and potential activity*; concealed, hidden, dormant, as latent powers, * * * latent ambiguity." A *latent defect* is, necessarily, an existing, lurking, inherent defect. When, therefore, the words "latent defect" are put in a bill of lading, they mean hidden defects existing at the time the bill of lading is issued. To say, as was said in the *Laertes*, that the ship was exempted from latent defects, even existing at the time of shipment, is simply to say the same thing twice.

This exception was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, she would be subject. Without such an exception the ship would be liable for unseaworthiness due to latent defects at the time of shipment. No other liability to which it may be presumed to apply can be suggested. It is evident from the language that the shipowner intended the exception to relieve him from that particular liability. Can the libelant reasonably pretend that she did not so understand the exception? She could not be heard to say she did not understand latent defects to include defects which existed at the time she received hér contract, because she is presumed to understand the meaning of the words in their ordinary sense. It is impossible to conceive that two reasonable persons about to enter into a contract would insert a stipulation against latent defects, and mutually agree or understand, at the time, that it was only to apply to defects which might become latent in the future. Yet this is what the appellant's argument as to the meaning of the exception ultimately comes to.

(b) This exception, unlike that in the *Caledonia*, does not stand in a long enumeration of exceptions relating to matters subsequent to the beginning of the voyage, and hence does not fall within the second ground of the decision in that case.

The contract here (pp. 145, 146), was for delivery "in the like good order and well conditioned, at the aforesaid port of New York [subject to the enumerated exceptions on page 146] unto J. W. Wuppermann." Between the words "at the aforesaid port of New York" and the words "unto J. W. Wuppermann," are two paragraphs of exceptions, some of which "relate to matters subsequent to the beginning of the voyage," but a large number of which relate to matters prior to the voyage. Amongst the latter are loss or damage from (1) fire on board in hulk or craft, or on shore; (2) latent defects in hull, tackle, boilers and machinery, or their appurtenances; (3) inaccurate description of goods shipped; (4) insufficiency in packing or in strength of package; (5)

inaccuracies of marks, numbers, designation or address on the packages.

It is not denied in the *Caledonia* that the carrier may, by apt words, limit or modify the implied warranty of seaworthiness, or that such a clause introduced in the bill of lading relates back to and modifies the warranty as of the time of shipment. The Court referred, with apparent approval, to the *Laertes* (*supra*), saying:

"The exceptions were held to limit the implied warranty of seaworthiness *in accordance with the expressed intention of the parties to that precise effect*, and for that reason only, take the case out of the general rule."

And, as if to save future cases, the Court added:

"*We are not dealing with the question of how far exceptions may be given effect in particular cases*, but whether by those under consideration claimants were exempted from liability for unseaworthiness, and we are clearly of opinion that they were not."

In the case at bar we submit that the implied warranty of seaworthiness is modified by "the expressed intention of the parties to that precise effect, and that the *Caledonia* does not control."

There is no liability from which the Court ought to be more willing to permit a shipowner to obtain exemption than from that for latent defects. From the nature of the case this liability arises wholly without his fault. The bare statement that the defect is latent shows that it has baffled and must baffle the extremest diligence and care. No liability for damages arising from latent defects could be established, except under the doctrine that the carrier is an insurer (The *Flowergate*, 31 Fed., 763; The *Concord*, 58 Fed., 913). This extraordinary liability has been taken away in some cases by statute, as in Germany, where a latent defect is treated as *force majeur* (Imperial Code of Commerce, Sec. 607).

2. The English rule with regard to the scope and extent of the exceptions in bills of lading is more liberal than that suggested in the *Caledonia*.

Carver, Carriage by Sea, Sec. 58, states it thus:

"When, however, a bill of lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before it was given. It is to be taken as the expression of the contract under which everything has been done. Thus, the exceptions of risks contained in it apply to the stowage of the goods, although that may have been completed before the bill of lading was given (citing the *Duero*, L. R., 2 A. & E., 393; *Pyman* v. *Burt*, 1 Cab. & E., 207; *Norman* v. *Binnington*, 25 Q. B. D., 475, 478; *Nottebohm* v. *Richter*, 18 Q. B. D., 63)."

In the last case cited, Lord Justice LINDLEY (p. 66) said:

"But we must not look only to the grammatical construction; and the proper way to treat the matter is that the exceptions apply to all the risks which the shipowner takes."

And in *Norman* v. *Binnington* (*supra*), A. L. SMITH, *J.* (p. 477), said:

"In this bill of lading the shipowner has exempted himself from damage to the shipper's goods by reason of rain, or of contact with other goods. This is not disputed, but the shipper contended that this exception does not apply, first, to damage done before the voyage has actually commenced. * * * As regards the first point, I do not agree with it. In my judgment, when once a shipowner has received a shipper's goods on board, and has, by his captain, given a bill of lading in the ordinary form for them, he is bound to deliver them at the port of discharge in the like good order and condition as when shipped, except he is exempted by exemptions contained in the bill of lading, and it is immaterial when the voyage in fact commences. * * * In my judgment, the shipowner under this bill of lading is *prima facie* exempted from liability for damage by rain, or by contact with other goods, after the goods have been shipped, whether the ship had started on her voyage or not."

3. It is generally understood in the commercial world that the exemption of "latent defects" amounts to a modification of the implied warranty of seaworthiness

(*Pollock on Bills of Lading*, 39). The Court should, if possible, adopt the well known commercial construction.

(*a.*) The wording of the exception found in this bill of lading, of "*latent defects in hull, tackle, boilers and machinery, or their appurtenances*," was adopted and has been retained after prolonged deliberation. Discussion of the form of this and the negligence clause has extended over a period of more than thirty years. The history of the discussion and of the results reached is given in *Wendt's Papers on Maritime Legislation*, Chapter II., entitled "The International Law of Affreightment in Connection with the Attempts to Agree upon Uniformity in the Wording of Bills of Lading" (pp. 295-513).

From this account it appears that the agreement reached in regard to general average by the York Congress of 1864 led to attempts to come to some similar arrangement upon the subject of freight and contracts of affreightment. The first step in this direction was a *projet* in regard to *freight* drawn up by two of the Belgian delegates to the International General Average Congresses (Wendt, p. 295). It was approved by an Executive Council of the National Association for the Promotion of Social Science, which met in Sheffield, October 5, 1865, under the presidency of Sir Robert I. Phillimore (Wendt, pp. 298, 308).

Changes in the terms and conditions of contracts of affreightment, found necessary by the different commercial conditions which followed the introduction of iron and steel vessels as instruments of commerce, were first considered in public deliberations after the opening of the Suez Canal, in July, 1871, at a meeting of merchants and others engaged in trade to the East, who agreed upon an Eastern Trade Bill of Lading (Wendt, p. 309). The form of this document is not preserved (Wendt, p. 345).

(*b.*) The deliberations of this committee were not, however, of an international character; and Dr. Wendt observes (p. 309) that it was left to the *Association for the Reform and Codification of the Law of Nations* to resume in 1879 the consideration of the international law

of affreightment at the very stage it had been left by the Sheffield Congress in 1865.

Three years were spent in correspondence and preparations for a meeting to deal with the subject, and in drafting the model bill of lading. The conference met at the Town Hall, in Liverpool, August 8, 1882, to debate the terms of the proposed bill (Wendt, p. 356).

The committee which drafted the form of the document submitted to the Association for its action was composed of representatives of the following commercial interests: (1) The Ship Owners' Association (two members); (2) the Steamship Owners' Association (two members); (3) the Chamber of Commerce (two members); (4) the American Chamber of Commerce (two members); (5) the East India and China Section of the Chamber of Commerce—English (two members); (6) the Iron and General Metal Trade Section of the same chamber (two members); (7) Cotton Section of the same (two members); (8) the Underwriters' Association (two members); (9) the Liverpool Law Society (two members), who were asked to take part in order to advise the committee on points of law and to assist in the framing of clauses. There were in addition seven of the Central Association members on the committee, who took part *ex-officio* in the deliberations of the committee (Wendt, p. 359). It will be observed, therefore, that the cargo and underwriting interests had on this committee *fourteen* members; that the ship owners and steamship owners had but *four* members; that there were two members from the Law Society and seven members from the General Committee. Even if it be assumed that the two lawyers and the seven members of the General Committee all took part in the interest of ship owners (a most improbable assumption), the committee which drafted the bill of lading submitted to the Conference would be composed of *fourteen* members representing cargo interests against *thirteen* representing ship owners' interests. Such a committee, presumably, would deal fairly with the cargo interests, however strict they might be in excluding provisions favorable to the ship owners.

The draft bill of lading (Wendt, pp. 363, 366), was considered carefully, clause by clause, by the

full body of the Association (Wendt, pp. 366–379). The result of their deliberations was the adoption of the form of document, since known as the "Liverpool Bill of Lading, 1882" (Wendt, pp. 379–382; Carver, Carriage by Sea, 2d Ed., p. 761).

In the draft bill presented to this Conference the clause in regard to latent defects was expressed as follows (Wendt, p. 364):

"Ship not answerable for losses through explosion, "bursting of boilers, breakage of shafts, *or any latent de-* "*fect in the machinery or hull* not resulting from want of "due diligence by the owners of the ship, or any of them, "or by the ship's husband or manager."

This clause was, without doubt, introduced as a limitation upon the shipowners' obligation as defined in *Lyon* v. *Mells*, 5 East., 428; *Kopitoff* v. *Wilson*, 1 Q. B. D., 377, and *Steel* v. *State Line*, 3 App. Cas., 72, to the effect that under his implied warranty of seaworthiness, he contracts not merely that he will do his best to make the ship reasonably fit, but that she *shall be* reasonably fit for the voyage (The *Gelfruin*, 10 Prob. Div., 103, 108).

It is remarkable that, although the discussion upon this document was very full, and participated in by a large number of European delegates, not a word is reported to have been said against the justice of this particular exemption. It was adopted by the Conference in precisely the form in which it was submitted (Wendt, p. 380).

(c.) In 1883 the New York Produce Exchange, a body composed of merchants, ship owners and agents, average adjusters and bankers, appointed a committee to draft a bill of lading for steamships, to be used as a basis of outward bound contracts (Wendt, pp. 382, 395). The committee was composed of three merchants, two ship owners, a banker and an average adjuster (Wendt, p. 395). They agreed on a form based chiefly on that adopted in Liverpool at the conference of the Association for the Reform and Codification of the Law of Nations in 1882 (Wendt, 382). In their report they proposed to retain

the clause in which occurs the exception for latent defects, but phrased as follows:

"Ship not answerable for * * * losses through ex-
"explosion, bursting of boilers, breakage of shafts, or any
"latent defect in hull or machinery, not resulting in either
"case from want of due diligence by the owners of the
"ship, or any of them, or by the ship's husband or
"manager" (Wendt, p. 387, 395-397.)

This bill, with slight modifications, was adopted by the New York Produce Exchange October 24, 1884 (Wendt, p. 405). The clause in question was slightly modified so as to read as follows (*Idem*, p. 406):

"It is also mutually agreed that the carrier shall not be
"liable for loss or damage occasioned by * * * any
"alleged defect in hull, machinery or appurtenances," the phrase "not resulting from due diligence, &c.," being omitted.

This bill of lading is now one of the standard forms (Carver, Carriage by Sea, 2d Ed., p. 366).

(*d.*) Meantime in England, in 1883, the Australian and New Zealand Underwriters' Association, consisting of eighteen separate insurance companies, and the combined London marine underwriters, consisting of thirteen companies, sent protests to the secretary of the Association for the Reform and Codification of the Law of Nations against the form of the bill of lading adopted in 1882 (Wendt, pp. 398 to 402). These protests, however, were aimed exclusively at the negligence clause, and *no objection was made in either protest to the exemption against latent defects.*

(*e.*) The New York Chamber of Commerce also, in a report, dated March 6, 1884, opposed the principle of the Liverpool and New York Produce Exchange bills of lading. They prepared an act to be introduced in Congress, making it unlawful to insert in contracts of carriage certain of the provisions which had been agreed upon in the Liverpool bill of lading, and were about to be adopted by the

New York Produce Exchange; and this act seems to have passed the House of Representatives (Wendt, pp. 402, 405). Although by this act it was made unlawful to insert any negligence exemption in a bill of lading, the effect of the third section was to permit the insertion of an exemption against latent defects. Section 3 of that act (Wendt, p. 403) provided that

"It shall not be lawful for any such vessel, her owners, "master, agent, or manager to insert in any bill of lading "any clause, covenant or agreement whereby the obliga- "tions of the owners of said vessel to properly equip, man, "provision and outfit such vessel, *and in every way and* "*manner within their, his or her power to render said* "*vessel seaworthy* and capable of performing her intended "voyage, shall in any wise be lessened, weakened or "avoided."

This did not exclude an exception of latent defects.

(*f.*) As a result of the agitation in England by merchants and underwriters against the Liverpool form, the next meeting of the Association for the Reform and Codification of the Law of Nations, in Hamburg, August, 1885 (Wendt, p. 430), rescinded its action taken at the meeting at Liverpool, in 1882, and adopted a short form of bill of lading without exceptions, but provided that it should be subject to all the conditions of the Hamburg rules of affreightment, which were also drawn up by the Association at the same time (Wendt, p. 472). These were based chiefly on a series of rules proposed by the Hamburg Chamber of Commerce (Wendt, pp. 435, 438).

The rule as to latent defects proposed by the Hamburg Chamber of Commerce (Rule 2; Wendt, p. 436), read as follows:

"Owners to be exempt from any latent defect in hull or "machinery (*not resulting in either case from unseaworth-* "*iness*, nor from want of due diligence by the owner of "the ship or by the ship's husband or manager)."

This rule, as modified by the society before adoption (Rule 2; Wendt, p. 472), read:

"The ship owner shall not be responsible for loss or "damages arising from *vis major*, public enemies, civil "commotions, pirates, robbers, fire, explosion, bursting "of boilers, breakage of shafts or screws, nor any latent "defect in hull or machinery not resulting from want of "due diligence by the owner, husband, or manager of the "ship."

The words, "*not resulting from unseaworthiness*," in the proposed rule being *omitted* from the rule as adopted.

(*g.*) The thread of this discussion was next resumed by a congress assembled at Antwerp in September and October, 1885, under order of the Belgian Government (Wendt, p. 476). This congress, amongst its conclusions, stated:

"It is, however, lawful for the parties to vary this [ship-"owners'] responsibility by special stipulations, with the "following exceptions: Owners of the ships should be "prohibited from relieving themselves, in advance, of "their responsibility by inserting a clause in the contract "of affreightment, the bill of lading, or any other agree-"ment (a) for any *acts of their captains or officers* tend-"ing to compromise the seaworthiness of the ships."

It is plain that this was not designed to prevent an exception from latent defects in the hull or machinery of the vessel; this would not, in the nature of things, result from any act of the captain or officers.

(*h.*) At a meeting of the Baltic Exchange, London, July 25, 1885, a bill of lading was adopted for use in trade with the Black Sea, Mediterranean and Baltic (Wend., pp. 428, 429). This document contained the following clause:

"Strandings, collisions, &c., are also excepted even when "occasioned by negligence, * * * but nothing herein "contained shall exempt the ship owner from liability to "pay for dunnage to cargo occasioned by bad stowage, by "improper or insufficient dunnage or ventilation, or by im-"proper opening of valves, sluices and ports, or by causes "other than those above excepted, and all the above excep-"tions are conditional on the vessel being seaworthy "when she sails on the voyage, *but any latent defects* "*in the machinery shall not be considered unseaworthi-*

" *ness* provided the same do not result from want of due " diligence of the owners, or any of them, or by the ship's " husband or manager."

In the form of the charter party for that trade the exception was extended so as to include latent defects in *hull* or machinery, or their appurtenances. These documents were before BROWN, *J.*, in the case of the Sanfield. (Appendix II. to this brief, where these provisions are set out.)

(*i.*) In December, 1885, a subcommittee of the London Chamber of Commerce (Wendt, p. 478) drafted an act, designed to be introduced in Parliament, which was entitled, " *An Act to regulate and define the duties and liabilities of* " *shipowners*" (Wendt, pp. 478-485). Section 6 of this proposed act provided:

" Any provision or exception in the bill of lading or in " the agreement purporting to relieve or exonerate in any " way any shipowner from any duty to properly equip, " man, provision, and fit out any ship, and to render it " seaworthy, or for any implied warranty of seaworthi- " ness in a contract of affreightment shall be null and " void;" but contained a proviso that " *no shipowner* " *shall be liable for injury, damage, or loss as afore-* " *said caused by or arising from any latent defects* " *in the hull, machinery,* tackle, equipment, or outfit of a " ship, which could not have been discovered by reason- " able care or skill on the part of the shipowner, master, " crew, servant or agent."

That this committee, representing cargo interests chiefly, voluntarily inserted the proviso concerning latent defects, is a concession of the reasonableness of the exemption. This report was adopted and confirmed by the general committee of the London Chamber of Commerce, April 5, 1886, but was not followed by any action of that body (Wendt, p. 486).

(*j.*) In the month of May, 1886, the Chambers of Commerce of Hamburg and Bremen, as well as the associations of shipowners at those ports, agreed upon the adop-

tion of a uniform bill of lading for steamships, and issued a statement respecting its introduction (Wendt., pp. 487, 490). That document contained an exception of "any latent defect in hull or machinery, not caused by unseaworthiness or want of due diligence by the owner or 'ship's husband.'"

(*k.*) Action was next taken on this subject in England at the meeting of the Association for the Reform and Codification of the Law of Nations, which met in London July 25, 1887, under the presidency of Sir Charles Butt, one of the Judges of the Admiralty Division (Wendt, p. 493) The subject of the form of the bill of lading was there fully discussed again by the representatives of different nations, including our own. Dr. Sieveking, president of the Hanseatic Court of Appeal at Hamburg, presiding during most of the discussion (Wendt, p. 496). The result of the deliberations was that the association receded from its action taken at Hamburg in 1885, passing the motion of Mr. Gray Hill, of Liverpool, to return to the bill of lading adopted by its conference in Liverpool in 1882 (Wendt, pp. 497, 506).

(*l.*) It is not reasonably to be doubted that in all of these cases the committees of shipowners, merchants and underwriters, who drew up the foregoing forms of bills of lading, understood and intended that the exception of latent defects should exclude all liability on the part of the owner for latent defects which existed at the time of shipment. The purpose of the exception is so universally known and recognized that any other interpretation of it would be a departure from the usual commercial construction.

VI.

THE EXCEPTION OF "LATENT DEFECTS," IS NOT UNLAWFUL AS OPPOSED TO SECTION 2 OF THE HARTER ACT.

1. The first and second sections of the Harter Act are not designed to apply to contracts made abroad, but only to those made in this country.

The Act in question (27 Statutes, 445), is appended (*post*, p. 53). The differences in the phraseology of the first, second and fourth sections from that adopted in the third section, support the contention stated.

The first section provides that it shall not be lawful for the owner, &c., of "any vessel transporting merchandise or property *from or between ports of the United States and foreign ports*" to insert in any bill of lading or shipping document any clause designed to relieve the shipowner from liability for negligence "in proper loading, stowage, custody, care or proper delivery" of the merchandise. It further provides that all such clauses shall be null and void and of no effect.

Section 2 provides that it shall not be lawful for "any vessel transporting merchandise or property *from or between ports of the United States of America and foreign ports*," her owner, &c., to insert in any bill of lading or shipping document any covenant or agreement "whereby the obligation of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle or stow her cargo, and to care for and properly deliver same, shall in anywise be lessened, weakened or avoided."

The third section provides more broadly "that if the owner of any vessel transporting merchandise or property *to or from any port in the United States of America*, shall exercise due diligence to make the said vessel in all respects seaworthy, &c., neither the vessel, her owner or owners, agents or charterters, shall become or be held responsible for damage or loss resulting from faults or

errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agents or master, be held liable for losses arising from dangers of the sea or other navigable waters," &c, nor for deviation in rendering salvage services.

Section 4 returns to the phraseology of sections 1 and 2. It provides that it shall be the duty of the owner or owners, master or agents "of any vessel transporting merchandise or property *from or between ports of the United States and foreign ports*, to issue to shippers of any lawful merchandise, a bill of lading" containing marks, numbers of packages, quantity, &c., stating whether it is carrier's or shipper's weight.

Section 5 provides "that for a violation of any of the provisions of this act, the owner or master of the vessel, guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000."

From these differences of phraseology it seems that the first, second and fourth sections were designed to apply only to cases where the bill of lading is issued in this country. This is confirmed by another circumstance. A violation of either of those sections entails a fine (Sec. 5). But the penal laws of one country have no extra territorial force, and cannot affect the rights of citizens of another (*Wharton, Conflict of Laws*, Secs. 4, 108, 883). It will not be assumed that Congress intended the act to apply, except where the general law will permit the enforcement of all of its provisions.

There is nothing in the statute evincing a clear intent to make any of the acts prohibited by the first, second and fourth sections of the statute unlawful if committed abroad; or that a bill of lading, which contained provisions contrary to Sections 1, 2 and 4, if lawful where made, should not be sustained and enforced in the courts of the United States.

2. Assuming the second section of the act applies to vessels inward bound, it does not prohibit the introduction of an exception against "latent defects."

This section as introduced by Mr. Harter (*post*, p. 53), and finally passed, is shown below:

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents or servants, to carefully handle and stow her cargo, and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

(NOTE.—The parts in italics were struck out by amendment.)

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* [*to*] properly equip, man, provision and outfit said vessel, *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants, to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

(NOTE.—The parts in italics were inserted by Senate amendments.)

It would seem from these changes that the design of Congress was simply to prohibit the insertion of a clause relieving a shipowner from the duty of using *due diligence* to make the vessel seaworthy. In other words, "the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision and outfit said vessel and to make said vessel seaworthy" are made *statutory obligations;* and it is then provided that no contract shall be lawful by which those specifically defined obligations are sought to be "lessened, weakened or avoided."

It is a mistake to argue, as contended by the appellant (Brief, p. 18), that Congress in this section "recognized "the obligations of the owner as of two kinds: (1) the ob- "ligation of the owner to exercise due diligence to prop- "erly equip, man, provision and outfit said vessel; (2) the "obligation *to make* said vessel seaworthy."

The statute speaks of "obligations," and proceeds immediately to define them as (1) the obligation to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and (2) the obligation to exercise due dili-

gence to make said vessel seaworthy (The *Delaware*, 161 U. S., at p. 470), and further provides that it shall be unlawful to insert any clause in a bill of lading whereby those obligations, *so defined*, shall be lessened, weakened or avoided.

That this was the intention of Congress is made clear by the third section, which transposes the dual obligations, mentioning first the duty as regards seaworthiness, and secondly the duty as to manning, equipping and supplying the vessel, limiting both of these obligations to the duty of using due diligence in regard to them.

3. It is improbable that Congress could have intended to prohibit an owner from contracting against a liability, not due to his fault, and which he cannot prevent.

In Germany the harshness of the rule as to latent defects led to the introduction of a provision in the Commercial Code, § 607, that "loss and injury arising from a defective condition of the vessel which, in spite of all possible caution, could not be discovered, are to be considered as loss and injury by the act of God."

The legislation of the Harter Act is thus directly in line with the previous legislation of Germany.

In the recent case of the *Millie R. Bohannon* (64 Fed. R., 883), Judge BROWN, dealing with the scope and evident purpose of the statute, said:

"The design of the Harter Act was, I have no doubt, to relieve the carrying vessel from her previous responsibility as insurer against latent defects; and to limit her liability as respects her seaworthiness to the obligations of 'due diligence' to make the ship seaworthy."

The references under appellant's third point do not show that, under the continental practice, a shipowner is liable, even in the absence of contract, for damage from latent defects. The contrary is believed to be the case.

VII.

THE SHIP IS RELIEVED FROM LIABILITY FOR LATENT DEFECTS BY THE PROVISIONS OF THE HARTER ACT.

(*a.*) By the second section of this act, it is unlawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports, her owner, master, &c., to insert in any bill of lading a covenant whereby "the obligations of the owner or owners of said vessel *to exercise due diligence* [to] properly equip, man, provision and outfit said vessel and to make said vessel seaworthy" shall be lessened, weakened or avoided.

The effect of this is (1) to define the obligations of the owners as to seaworthiness and equipment of the vessel, making them statutory; and (2) to make it unlawful to insert any stipulation lessening the obligations thus defined.

If this view be correct, it would follow that even apart from a contract, a shipowner would not be liable for damage arising from unseaworthiness, provided it was latent and undiscoverable, by the exercise of due diligence, at the outset of any particular voyage.

(*b.*) That this was the intention of Congress, is borne out by the language of the third section, the opening clause of which provides:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America *shall* [1] *exercise due diligence to make the said vessel in all respects seaworthy*, and [2] properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters," &c.

The preliminary part of this section is a condition to the owner's relief from liability on account of the losses enumerated in the second part. Relief comes under this section, irrespective of contract. It is statutory, and must bo accorded, irrespective of contract, unless the latter expressly or by necessary implication excludes the operation of the statute. When, therefore, the Court has to deal with a warranty which is not expressed in the shipping document, but is stated to be an implied warranty of seaworthiness, that warranty should not be placed any higher than the obligation of the owner is placed or recognized by statute.

(c.) A number of cases have held that the effect of this statute is to relax the former strict rule with regard to seaworthiness.

In the *Millie R. Bohannon* (64 Fed. Rep., 883), BROWN, *J.*, dealing with the scope and purpose of the statute, said:

"The design of the Harter Act was, I have no doubt, to relieve the carrying vessel from her previous responsibility as insurer against latent defects; and to limit her liability as respects seaworthiness to the obligations of 'due diligence' to make the ship seaworthy."

In the *Silvia*, 68 Fed. Rep., 230; 35 U. S. App., 395, WALLACE, *J.*, in delivering the opini on of the Court of Appeals, said:

"It is perfectly obvious from the language of this act that Congress intended to relax the severity of the obligation imposed on the shipowner as a carrier of goods by the pre-existing law as it had been declared by the courts. It had long been determined that in every contract for the carriage of goods by sea there is an implied warranty that the vessel is seaworthy at the time of beginning her voyage, unless this is superseded by some express condition in the contract, * * * It has also always been the law that the exemption of the dangers of the seas in the bill of lading or other contract of affreightment does not exonerate the shipowner from responsibility for injury to the goods which

results from a breach of his implied obligation to provide a seaworthy vessel. Thus the carrier was responsible for a loss produced by the dangers of the sea if it was one which would not have happened except for the concurrencence of some unknown and undiscoverable defect in the equipment of the vessel, which defect, because it was not discoverable, could not be remedied. *In the place of this responsibility*, the act of Congress substitutes a *less stringent one* by declaring that if the owner shall exercise '*due diligence*' to make the vessel in all respects seaworthy, neither he nor the vessel is to be responsible for damages or loss in transporting merchandise, resulting from 'faults or errors in her navigation or management,' nor for losses arising from dangers of the sea. Other sections of the act emphasize the meaning of the particular section. Sections 1 and 2 prohibit carriers from relieving themselves by contract from the obligation of exercising 'due diligence to make their vessels seaworthy.' * * * Read as a whole, the purpose of the act manifestly is, on the one hand, in the interests of the public, to prevent carriers from evading responsibility *to exercise due diligence* in providing seaworthy vessels, and in the handling and care of the cargo; and, on the other hand, *whenever they have exercised due diligence in these respects*, to absolve them from liability for losses arising during the transit from the perils of the sea, and from faults or errors in the navigation or management of vessels."

This Court, in the *Delaware* (161 U. S., 459, 471), said: "It is entirely clear, however, that the whole object of "the act is to *modify* the relations previously existing be- "tween the vessel and her cargo."

(*d.*) If it be found on the evidence of Mr. Congdon and Mr. Martin and Captain Saunders that the master's act in filling the tank at sea, while the ship was rolling, was negligence, such negligence would be a *fault or error in the management or navigation* of the ship, within the third section of the Harter Act. Plainly, the owner would be relieved from liability for the loss, notwithstanding the latent defect, because he had "used due diligence to make the said

vessel in all respects seaworthy," within the language of the same section. It would be very unreasonable to hold that the ship was not absolved from liability for latent defects, if the master's act did not amount to a fault or error in the management or navigation of the ship, or was not a "danger of the sea or other navigable waters." Such a holding would be equivalent to saying that an owner shall not be liable for a latent defect, if the immediate cause of the damage resulted from the negligence of his servants, but shall be if they were not negligent, although in each case due diligence to make the ship seaworthy has been exercised.

VIII.

IF THE LOSS WAS CAUSED OR CONTRIBUTED TO BY THE NEGLIGENCE OF THOSE IN CHARGE OF THE STEAMER, IN THE MODE OF FILLING THE TANK, OR TAKING SOUNDINGS, OR IN THE OMISSION TO SOUND, SUCH NEGLIGENCE WAS IN THE MANAGEMENT OR NAVIGATION OF THE SHIP, WITHIN THE MEANING OF THE THIRD SECTION OF THE HARTER ACT, WHICH ABSOLVES THE SHIP FROM ALL LIABILITY THEREFOR.

1. The evidence tending to show mismanagement in the filling of the tank has been specifically referred to. If the evidence as to that, which is uncontradicted, be accepted by the Court as proof of fault, and if such fault caused or contributed to the damage, the owner is relieved from any liability from such cause. Due diligence to make the vessel seaworthy, within the requirements of the third section of the act has been shown, and the act of filling the tank was one in the "management or navigation of the ship," and the fault in that regard, if any, was a fault specifically enumerated in the third section of the statute (The *Glenochil*, 1896 Prob., 10;

The *Silvia*, 35 U. S. App., 395; The *Sandfield*, Appendix post., p. 56).

2. If there was any negligence in regard to taking soundings, either of the tank or of the No. 1 hold, during the process of filing, such negligence would also be a "fault in the management of the ship" (The *Glenochil*, *supra;* The *Sandfield*, *supra*).

In the latter case, the failure of the engineer to open a sluice door on a bulkhead, which was a substitute for sounding through pipes to ascertain the presence of water in a cargo compartment, was held to be a fault in the *management* of the ship.

There was no trouble with the sounding pipe in this case. The water was finally discovered in the hold by that means (fols. 324, 325).

The appellant's argument that the sounding failed to disclose water during the 4th of September (the day after the tank is claimed to have been filled), because the limber boards were too tight, is answered by the preponderating proof that the leak in the tank was discovered on the morning next after it was filled and the water was then pumped out. It did not remain there over a day as contended by the engineer (fols. 32, 47, 323).

The chief officer's log contains no entry on the 3d or 4th of September, of filling the tank, but only an entry of emptying it on the 5th (pp. 159, 160, 161). The chief engineer's log (p. 162), contains an entry September 3d: "pumped up fore peak tank," but the Court will observe that the entry is apparently an afterthought. The preceding and subsequent entries on that date, are opposite the commencement of the respective watches, but opposite the watch beginning 8 P. M., two marks are made across the page, apparently to indicate that there was no entry to make after that watch. The entry is afterwards written in between that time and the commencement of the following watch (p. 162). He enters the pumping out of the tank on September 5th (p. 164),

but this entry is contrary to the recollection of both the captain and the carpenter (fols. 32, 47, 323).

It was found in both courts below that the leak was discovered *on the next morning after the tank was filled.* This finding robs the argument about failure to sound and tight limber boards of all force.

Last Point.

THE DECREE APPEALED FROM SHOULD BE AFFIRMED WITH COSTS.

New York, April 21, 1897.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Claimant-Appellee.

J. PARKER KIRLIN,
Of Counsel.

APPENDIX I.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill).

P. R. 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between parts of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* properly equip, man, provision, and outfit said vessel, and *to* make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly

properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or*

deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be*

other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.)

liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July*, eighteen hundred and *ninety-three.*

Passed the Senate as amended February, 1893. 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.

APPENDIX II.

THE SANDFIELD.

(District Court, S. D., New York, February 27, 1897.)

1. Damage to Cargo—Broken Rivet—Sea perils.

At the close of a stormy voyage on which a steel steamer was damaged about her decks, had her wheel chains parted, and her propeller shaft fractured by heavy seas, a leak was discovered around a rivet in the after port bilge. Three-sixteenths of an inch of the outer end of the rivet was gone; the end of the remaining part showed evidence of fracture. This bilge had been sounded daily before the heavy weather began and had been opened and cleaned by the crew before the loading of the cargo. No water was entering it at such times. *Held*, upon evidence of similar loss of rivet-heads in previous cases, probably from excessive vibration through the racing of the propeller in rough weather, that the rivet was fractured by that cause, which was a peril of the sea.

2. Same—Seaworthiness—Inequality in strength of rivets.

The cylindric part of the broken rivet was somewhat oblique to the plane of the inner head, showing that the holes in the overlapping plates through which it had been driven when hot were not perfectly true. Both heads of the rivet had something of a cant. No other was broken. *Held*, that although the cant at both ends might diminish its endurance by subjecting it to an unequal strain, yet, not being a weak or improper rivet, mere inequality in the strength of the rivets would not amount to unseaworthiness or a violation of a charter provision that the ship shall be "tight, staunch and strong."

3. Same—Sea perils—Presumptive cause.

Where it satisfactorily appears that sea perils have been encountered adequate to cause damage to a seaworthy ship, and there is general proof of seaworthiness, the damage is presumptively due to such perils.

4. Same—Injury by sea water—Exception of loss by perils of the sea.

Damage to cargo by sea water entering the hold around a loose rivet, which has been fractured by perils of the sea, is a loss by perils of the sea within the exceptions of a charter party and bill of lading.

5. Same—Diligence in docking for examination—Harter act.

A comparatively new steel steamer, built by first-class makers, which had passed its first Lloyd's survey in February, 1895, when the whole bottom was inspected and the riveting found sound, started on the voyage in question in January, 1896. No accident to the bottom had intervened. *Held*, that reasonable care of a vessel does not require docking for examination more than once a year, in the absence of some known necessity for it, and that accordingly there was no lack of diligence in the inspection of the ship.

6. SAME—CHARTERED SHIP—CLAUSE "ALL CONDITIONS AS PER CHARTER PARTY" IN ENDORSED BILLS OF LADING—EFFECT OF CHARTER EXCEPTIONS—LATENT DEFECT.

The goods were shipped in a chartered ship by the charterers, and the bills of lading contained the clause, "All conditions as per charter party." *Held*, that the receivers of the cargo, as endorsees of the bills of lading, took the goods subject to the provisions of the charter party; that the ship was entitled to the benefit of an exception of "latent defects in the hull" contained in the charter party; and that if there was any defect in the rivet, it was latent, and within the exception.

7. SAME—LEAVING SLUICE SHUT—OPERATION OF HARTER ACT NOT IMPLIEDLY EXCLUDED.

The charter party contained a number of exceptions, including perils of the sea, and a further provision that "nothing *herein* contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by improper opening of valves, sluices or ports, or by causes other than those above excepted." *Held* (1) that the damage was by "a cause above excepted," in the sense of the clause; (2) that the engineer's neglect in leaving the sluice *shut* was not an "improper *opening*" of it; (3) that this clause did not impliedly exclude the operation of the Harter Act or deprive the ship of the benefit of the exceptions therein contained.

8. SAME—HARTER ACT "MANAGEMENT"—LEAVING SLUICE SHUT.

The opening of a sluice gate, designed to empty the bilges, was neglected during heavy weather. The accumulating water overflowed the bilges and damaged cargo properly stowed in the holds. *Held*, that the neglect to open the sluices was a fault in the "management of the ship," within the third section of the Harter Act, and that the ship and owners were exempted thereby from liability for the resulting damage.

Libel by the American Sugar Refining Company against the steamship Sandfield to recover the sum of $10,000 for damage to a cargo of sugar.

Cowen, Wing, Putnam & Burlingham, for Libelant.
Convers & Kirlin, for Claimant.

BROWN, *J.*—The above libel was filed to recover damages to a large quantity of sugar in Nos. 3 and 4 holds of the steamship Sandfield on her voyage from Alexandria, Egypt, to New York, in February and March, 1896. The damage was caused by a great accumulation of sea water. How the water got access to those holds was not known until after the cargo was discharged and the vessel docked, when a defective rivet in the outer plating of the ship was found, leading into the port bilge or sluiceway, about three feet forward of the sluice gate, in the stuffing-box bulkhead, and a few inches below the flooring over the limbers, about fourteen feet below the water line.

The vessel sailed from Alexandria on January 30, 1896. There was no leak of any kind until February 14, four days after passing Gibraltar. On that day weather of extraordinary severity set in, and continued gales were encountered until arrival at the Delaware Breakwater on March 6. In this weather the ship received much injury from the seas; two lifeboats were damaged, one washed away; the winches were damaged, pipes and ventilators on deck carried away, bridge, rails and stanchions bent and broken; the after deck started in two places, the wheel chains parted several times, shackles parted, and the propeller shaft fractured through racing, while pitching in the heavy seas. The leak occurred during this stormy weather. The defects in the rivet, when examined, were sufficient, according to the estimate of Mr. Mancor, the libelant's expert, to fill the port bilge, which was 80 feet long from the sluice gate to the bulkhead forward, in about seven hours. Had the sluice gate leading into the well been opened twice a day during the stormy weather, as was customary at other times, no such accummulation of water would have occurred, as the leak would have been soon discovered in pumping the water from the well, and the pumps were sufficient to prevent any accumulation of water or consequent damage. But the opening of the sluice gates during the heavy weather was neglected; and the accumulating water having overflowed the bilges, gradually engulfed the bags of sugar, and formed within the bilges a candied mass, which at length somewhat checked the leak, but not without a large loss and damage to the sugar.

When the defective rivet was found on docking the ship, it was knocked in, and has been produced in Court.

The cylindric part is somewhat oblique as respects the plane of the inner head, which is intact, showing that the holes in the overlapping plates through which it was originally driven when hot, were not perfectly true, so that both heads must have had something of a cant. The exterior end of the rivet, after being driven in hot, was battered down, so as to fill up the flaring countersink on the outer surface of the ship's plate, extending into the plate about $\frac{3}{8}$ of an inch in depth, and thus forming a clinch or

outer head flush with the plate. The defective rivet proves to be $\frac{3}{16}$ of an inch short, and the countersunk portion, which should be flaring outwards, is gone. The defendant contends that the rivet and the rivet hole were in good order at the time when the vessel sailed; that the outer rivet head or countersunk portion was broken off by fracture, probably through the great vibration caused by protracted racing in heavy weather; that if the rivet was defective at the time of sailing the defect was latent, and therefore within the express exception of the charter under which the sugar was shipped; and that the failure to open the sluice gate was negligence in "the management of the ship," for which, under the Harter Act, the respondents are not answerable.

The libelant contends that the rivet was defective when the ship sailed, and that the damage falls within the express liability created by the provisions of the charter and the bill of lading, and that those provisions supersede the Harter Act in the present case, even if "due diligence" were shown, which, it is claimed, is not proved.

Before considering the terms of the charter and bill of lading, my conclusions concerning some controverted matters of fact should be stated. The clear weight of evidence seems to me to show the following:

(1.) That the exterior end of the rivet to the extent of about $\frac{3}{16}$ of an inch, including all the flaring or countersunk portion, was gone at the time the ship was docked and the defect discovered, *i. e.*, before the rivet was driven out.

The loss of $\frac{3}{16}$ of an inch in length could not have been caused by the two or three blows of the hammer by which the rivet was driven back. Had the rivet been then entire, it could not have been driven back without first cutting out, or breaking off, the flaring portion which forms the clinch or head. It was neither cut nor broken off at that time; and it could not have got into the present shape by rust alone. Had the flange been broken in driving back, or had the flange rusted away, the cylindrical part of the rivet would have shown its full length, or nearly its full length, instead of being $\frac{3}{16}$ of

an inch short; and if broken off, the circumference at the end would naturally also have shown marks of forcible breaking all around, quite different from those which the rivet now exhibits On the other hand the rivet does shows upon the circumference, at the outer end, some toothed marks of rupture, such as would be likely to attend a fracture at the depth of the countersink, viz., $\frac{3}{16}$ of an inch; and I accordingly find that there was such a fracture and loss of the outer end of the rivet to that extent.

(2.) This fracture and the loss of the countersunk portion of the rivet occurred sometime during the heavy weather that the ship encountered, beginning on February 14th, more than two weeks after the ship sailed from Alexandria. This is the necessary inference from the fact that the rivet hole was about 14 feet below the water line, and from the facts (*a*) that prior to the ship's arrival at Alexandria, there had been no noticable leak; (*b*) that no leak was visible at Alexandria, when the limber boards were all taken up and the pockets of the limbers carefully cleaned at the place where the defective rivet was afterwards found; and (*c*) that after sailing from Alexandria, and for 16 days until heavy weather set in, the sluices were open daily and no water was found up to that time, nor on the preceding voyage from Newport to Genoa, when the sluices were opened daily. There is no known cause to which the loss of the countersunk part of the rivet can be ascribed before the heavy weather on this voyage; and if the loss of the rivet head had taken place at some indefinite time before sailing, there would have been some previous leak noticeable. The rivet, it is true, now shows corrosion upon its circumference; but this rust is not greater than is explainable by the action of the sea water on this voyage, particularly when combined with sugar, forming a sugar acid. The corrosion is, in fact, very much less than might have been caused in the same time by this acid infusion in a different situation, as shown by the case of The Alvena, 74 Fed., 252.

(3.) There is not sufficient evidence to warrant me in finding that there was any lack of diligence in the inspection of the ship. The vessel was comparatively new, and built by first-class makers. She passed her first Lloyd's survey in February, 1895, when the whole bottom was inspected and the riveting found sound. No accident intervened. Diligent care of the ship does not require redocking more than once a year, in the absence of some known necessity for it; and at the time of this voyage, a year had not expired since the last docking.

(4.) The excessive vibration caused by long continued racing in heavy weather is adequate to explain the breaking off of the countersink of the rivet. This has been known to occur before; usually with more than one rivet-head broken off. Here there was but one broken This, however, does not discredit the cause in this case, because there is otherwise abundant evdience of the existence of the cause in the long continued very heavy weather, and much other damage to the ship. In the case of the Alvena there was no evidence of the existence of any sufficient external cause (74 Fed., 252, 254-5). But where the existence of an adequate cause of the damage to a seaworthy ship is proved, that is presumptively sufficient to relieve the ship (The Warren Adams, 74 Fed., 413, 416; The Sintram, 64 do., 884). Cases of single rivet heads broken off are in evidence. That only one was broken is evidence of the soundness of the general structure, or that the vibration was not sufficiently violent or long continued to break others. It is also likely enough that the cant given to the rivet by driving it through the overlapping holes which were not quite true, and the cant given to the clinch at both ends might diminish its endurance, by subjecting it to an unequal strain, and increasing the injurious effects of the vibration of the plates against it. If such was the fact, any such mere inequality in the strength of the rivets does not amount to unseaworthi ness, or a violation of the provision of the charter that the ship shall be "tight, staunch and strong."

Upon the above conclusions of fact, it follows that the access of water through the rivet hole arose primarily

from a peril of the sea,; that is to say, from an access of sea water through an accident to a seaworthy ship, arising from extraordinary weather, the consequent racing of the engine, and the snapping off of one of the rivet heads. By the general exception of sea perils, the ship is consequently relieved from liability, unless it further appears from the evidence that the injury arising from the leak might have been avoided by reasonable diligence, or that some special provisions of the contract of carriage preclude any exemption of liability from such a cause.

The evidence leaves no doubt that had the sluice gate been opened twice daily as customary, no damage would have happened, notwithstanding the leak. It is evident, however, that the daily opening of the sluice-ways is a part of the "management of the ship"; and inasmuch as the evidence shows that the owners and their agents exercised "due diligence," the ship and owners are exempted from liability for this resulting damage by the third section of the Harter Act (Act Feb. 13, 1893, 2 Supp. Rev. St., 81-2), unless the provisions of the Harter Act are superseded by the contract, as the libelant claims (Hine *vs.* Bermudez, 68 Fed., 920, 923). Although this act applies to shipments upon foreign vessels transporting cargoes to this country, I have no doubt that shipowners for whose benefit the exemptions of the 3d section were provided may waive these benefits and bind themselves to a more extended responsibility than the statute imposes, if they choose to do so; but no such waiver should be found, except upon explicit proof, or undoubted inference.

The charter-party in this case, after reciting that the ship should be tight, staunch and strong, and in every way fitted for the voyage, provides for the delivery of cargo, but with numerous exceptions, which are stated in Section 4, among which are the following:

"The act of God, perils, dangers and accidents of the sea or other waters of what nature and kind soever * * * any *latent defect in hull and / or machinery*, stranding, collisions, and all other accidents of navigation, and all losses and damages caused thereby are excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants

of the shipowner; but unless stranded, sunk or burnt, *nothing herein contained* shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or absence of customary ventilation, or *by improper opening of the valves, sluices and ports*, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being *seaworthy* when she sails on the voyage; but any *latent defects* in the hull, pipes or machinery shall *not be considered unseaworthiness*, provided the same do not result from want of due diligence of the owners or any of them, or by the ship's husband or manager."

The 19th clause of the charter provides that

"the Mediterranean, Black Sea and Baltic grain cargo steamer bill of lading, 1885, is to be used under this charter, and its conditions are to form part thereof."

The bill of lading contains the clause "all conditions as per charter-party," giving the date of the charter, and then enumerates substantially the same exceptions as the charter; but as respects *latent defects* it reads that "latent defects *in the machinery* shall not be considered unseaworthiness," &c.; whereas the charter reads, "latent defects *in the hull* and / or machinery, &c."

The shipment in the present case, however, was by the charterers; and the libelants, as endorsees of the bill of lading, took the goods subject to the provisions of the charter-party, inasmuch as the bill of lading expressly recites, "all conditions as per charter-party." The somewhat narrower provision of the bill of lading as respects the hull, therefore, does not exclude the additional provisions of the charter, and the provisions of the charter must, therefore, govern.

The effect of the charter exceptions is largely the same as the provisions of the Harter Act—passed eight years after this form of bill of lading was adopted. By the language of the charter, a latent defect in the hull or machinery is not to be considered unseaworthiness, when, as I find here, there was no want of due diligence. If there was any defect in the rivet, it was a latent defect, as it was not visible upon such inspection as was required

and given, as above found; so that the ship cannot be deemed unseaworthy under the charter (The Carib Prince, 68 Fed., 254).

The negligent failure to open the sluice gate in the heavy weather is clearly covered by the express exception of "perils, dangers or accidents of the sea or other waters * * * and all other accidents of navigation, and all losses and damages caused thereby, even when occasioned by negligence of the master, mariners or other servants of the shipowners."

In effect, this exception, as applied to this case, is identical with the third section of the Harter Act, since the same negligence is a part of the "management of the ship" (The Silvia, 64 Fed., 607; affd., 68 do., 280. The Etona, 64 do., 880).

The subsequent provision of the charter, viz., that "nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned * * * by causes *other than those above excepted*," does not aid the libelant; because the exception of sea perils and of negligence of the seamen in connection therewith is one of the "causes above excepted;" and it was that cause that made the leak operative to the libelant's damage.

The charter contains the further provision:

"That nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned * * * *by improper opening of valves, sluices and ports.*"

There can be no doubt that the opening of valves, sluices and ports during the voyage is a part of the "management of the ship" (The Silvia, *supra*). Damage arising from negligence in this regard, therefore, would fall within the exemption of the Harter Act; though this charter and the bill of lading provide that nothing *therein* shall exempt the owner from liability caused by improperly opening the valves, sluices or ports. The negligence in this case, however, does not fall within the *language* of this qualification. For this damage did not arise from any improper *opening* of the sluice gate, but from the neglect

to open it at all during the heavy weather. The language of this adopted form of bill of lading, and the similar words of the charter, were a subject of such special deliberation that I do not feel authorized to extend it to improperly keeping the valves, sluices and ports *shut*. The danger contemplated from the *improper opening* of valves, sluices and ports, was apparently of a different and much more serious kind, viz., the danger to the whole ship from being thus opened to the sea: making her liable to be quickly sunk, or to great general damage before the fault could be remedied. The probable ground of this particular exception, therefore, forbids its extension by construction to cases beyond its letter and its probable reason.

Even if the effect of this exception in cases coming within it, would be to supersede the provisions of the Harter Act, and to make the ship and owner legally liable for the damage arising from open valves, &c., under their general liability for negligence, as to which I express no opinion, nevertheless, inasmuch as I cannot find this damage to be covered by this clause of the charter and bill of lading, the previous general exceptions, and the 3d section of the Harter Act to the same effect are sufficient to absolve the ship.

The libel must be dismissed, with costs.